SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCR 2017 0218

JOHN ANILE — Appellant

v

THE QUEEN — Respondent

JUDGES	PRIEST, BEACH and WEINBERG JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	20 and 21 August 2018
DATE OF ORDERS	21 August 2018
DATE OF REASONS	17 September 2018
MEDIUM NEUTRAL CITATION	[2018] VSCA 235
JUDGMENT APPEALED FROM	*DPP v Anile* (Unreported, County Court of Victoria, Judge Coish, 16 June 2017 (Conviction))

CRIMINAL LAW — Appeal — Conviction — Appellant convicted of money laundering and obtaining financial advantage by deception — Prosecution failure to disclose relevant material which was potentially exculpatory or capable of having assisted defence case — Improper cross-examination by prosecutor — Incompetence of defence counsel in manner trial conducted— Judge's charge — Inappropriate unreliable witness warning — Aggregate of errors giving rise to miscarriage of justice — Appeal allowed — New trial ordered.

Appearances:	Counsel	Solicitors
For the Appellant	Mr S Gillespie-Jones with Ms E McKinnon	Ressan Lawyers
For the Respondent	Ms D Piekusis with Ms J Croxford	Mr J Cain, Solicitor for Public Prosecutions

PRIEST JA
BEACH JA
WEINBERG JA:

Introduction

1 It has been said that the central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law.[1] Another way of putting this is that an accused person has the right not to be tried unfairly. In the present case, far too many things went wrong in the appellant's trial for this Court to conclude that his trial was not unacceptably unfair. In our view, an aggregate of defects — including the objectively unfair tactics of the prosecutor, the incompetence of defence counsel in the manner in which he conducted the trial, the judge's failure to rein-in improper cross-examination, and the significant misdirection of the jury in a particular respect — combined to effect a substantial miscarriage of justice. Quite separately, the conviction on charge 2, for obtaining financial advantage by deception, was unsupported by the evidence in light of the way in which that charge was particularised and framed. The appellant's convictions for money laundering and obtaining financial advantage by deception cannot be permitted to stand.

2 As a result, at the conclusion of the hearing of the appellant's application for leave to appeal against conviction in this Court, we made orders granting leave to appeal, allowed the appeal, set aside the convictions, and ordered a new trial. We indicated that we would later give reasons for making those orders. These are the reasons.

[1] See *Jago v District Court of NSW* (1989) 168 CLR 23, 56–7 (Deane J) ('*Jago*'). It has also been observed that a criminal defendant 'is entitled to a fair trial but not a perfect one': *US v Lutwak*, 344 US 604, 619 (1953). See also *Jago*, 49 (Brennan J); *Dietrich v The Queen* (1992) 177 CLR 292, 362 (Gaudron J); *R v Dupas (No 3)* (2009) 28 VR 380, 422 [158] (fn 93) (Ashley JA), 430–31 [188] (Weinberg JA); *Romolo v The Queen* [2016] NSWCCA 240 [28] (Button J); *Packard (a Pseudonym) v The Queen* [2018] VSCA 45 [112]–[114] (Priest JA).

Overview

3 Throughout May and June 2017, the appellant stood trial in the County Court on one charge of money laundering[2] (charge 1) and one charge of obtaining financial advantage by deception[3] (charge 2).

4 On 16 June 2017, the jury convicted the appellant of both charges. On 30 June 2017, he was sentenced to a term of five years' imprisonment, with a non-parole period of three years.[4]

5 In essence, the prosecution case was that the appellant — then a practising solicitor based in Williamstown — purchased land on Kororoit Creek Road, Williamstown for the purpose of developing it. He purchased it from brothers Michael and Loukis Georgiou, the Contract of Sale being dated 9 August 1994. It was alleged that the purchase was used to 'launder' the sum of $400,000 in cash given to the appellant by Pasquale ('Percy') Lanciana, and that, through a failure to declare the cash component of the purchase, the appellant avoided paying stamp duty totalling $14,888. At that time, the appellant and Lanciana were good friends though, as will be seen, they later fell out.

6 It should be noted that originally, the prosecution case against the appellant was framed on the basis that the $400,000 in cash that was paid for the land at Kororoit Creek Road was part of the proceeds of a 1994 robbery of an Armaguard vehicle in Richmond to which Lanciana had been party. However, by the time the case came on for trial, the prosecution had amended the charge so that it alleged that the $400,000 cash was the proceeds of crime, without specifying any link to that particular robbery.

7 There was no dispute at trial that the appellant negotiated the purchase of the land

2 *Crimes (Confiscation of Profits) Act 1986* s 41Q. The maximum penalty for that offence is 10 years' imprisonment.

3 *Crimes Act 1958* s 82(1). The maximum penalty for that offence is 10 years' imprisonment.

4 The judge imposed a sentence of five years' imprisonment on charge 1, and six months' imprisonment on charge 2, the sentence on charge 2 being wholly concurrent with that imposed on charge 1.

from the Georgiou brothers, or that the stated purchase price in the Contract of Sale was $555,000. The prosecution alleged, however, that the actual purchase price was $955,000, and that the sum of $400,000 obtained from Lanciana was paid to the Georgious in cash by the appellant in several instalments.

8 The defence case was that Lanciana had given the appellant $200,000, obtained from legitimate sources, that sum being paid to the Georgious, in cash, as a fee for services. There was only one cash payment and it was of $200,000, not $400,000. Special Condition 10 of the Contract of Sale provided for the subdivision of the subject land to take place prior to settlement, a fee of $60 per square metre being payable for the privilege of subdivision.[5] The area of the land prior to subdivision multiplied by $60 equalled the contract price of $555,000 plus $200,000, which the appellant paid to the vendors on 9 August 1994 when the contract of sale was entered into. Thus, so the defence contended, the $200,000 was both justified and disclosed by Special Condition 10. Moreover, expert evidence led by the defence was that the $200,000 in excess of the contract price, if paid for the provision of additional services, was not dutiable.

Grounds of Appeal

9 Ultimately, the appellant relied on eight grounds of appeal as follows:[6]

> 1A. A miscarriage of justice occurred by the prosecution failing to disclose:
>
> (a) the recorded covert conversations of Lanciana stating that the applicant did not know from whence the money said to be laundered came;
>
> (ba) documents evidencing that the purchasers of the subdivided lots were in possession prior to 9 August 1995; and
>
> (c) statutory declarations, both draft and executed, for the sale of the subdivided lots sworn by Michael Georgiou swearing that

[5] The Contract of Sale recorded the purchaser to be, '<u>JOHN ANILE</u> and/or Nominee'. On 4 October 1994, Anile Residential Pty Ltd was incorporated. The appellant was a Director and 50 per cent shareholder of that company. The nomination clause was exercised in favour of the company which subsequently, after subdivision, sold the various properties to a number of individual purchasers.

[6] Ground 3 was abandoned, and ground 1 was amended during the hearing as indicated. Leave was granted to the appellant's counsel in the course of the hearing to add grounds 8 and 9.

the head contract for the sale of each lot was signed on 9 August 1994 with a purchase price of $555,000, the property was subdivided and the price in the attached schedule was adequate for the property transferred.

~~The above documentation being fresh evidence or new evidence.~~

2. A miscarriage of justice occurred in cross-examination by the prosecutor asking questions without sufficient basis for doing so:

   (a) of Lanciana:

      (i) shooting his wife;

      (ii) killing a debtor; and

      (iii) committing an armed robbery.

   (b) of Adele Anile as to whether her husband was having a sexual relationship with his friend Jinny Sharp; and

   (c) of the applicant forging a receipt.

~~3. A miscarriage of justice occurred by the admission of credit evidence in the cross-examination of the applicant and Lanciana.~~

4. A miscarriage of justice occurred in cross-examination of the applicant by the prosecutor in:

   (a) misleading the witness and the court;

   (b) asking offensive questions;

   (c) making 'editorial comments;'

   (d) cutting off answers before they were completed;

   (e) framing questions resting on controversial assumptions; and

   (f) asking argumentative questions.

5. The conviction on charge 2 was unreasonable.

6. The learned trial judge erred in his directions on charge 2:

   (a) directing the jury that the applicant must have obtained the financial advantage for himself when it was undisputed that a corporation had the liability to pay stamp duty; and

   (b) directing that notwithstanding that the corporation obtained the benefit of the reduced stamp duty, failed to direct that it must be proved that the applicant obtained the financial advantage from the corporation.

7. A miscarriage of justice occurred as a result of an accumulation of errors.

8. A substantial miscarriage of justice occurred by the learned trial judge giving an unreliable witness warning for the witness Lanciana when there were good reasons for not doing so:

   (a) the direction had the effect of undermining the defence case by discrediting the only witness who could be called to give evidence as to the source of the funds;

(b) there was a danger that the direction could be applied adversely to the applicant as the direction assumes that the applicant is criminally concerned;

(c) there was a danger that the presumption of innocence could be undermined; and

(d) there was a danger that the direction would endorse the prosecution case.

9. A substantial miscarriage of justice occurred as the result of the incompetent manner in which counsel conducted the trial.

10 We have determined that a number of the errors or defects embodied in the grounds of appeal lead inexorably to the conclusion that the appellant's trial miscarried.

11 So that the issues in the trial and on the appeal might be understood, however, it is necessary at the outset to say a little more about the evidence led below.

Evidence in the prosecution case

12 Evidence concerning the negotiations for purchase of the land in Kororoit Creek Road, and the payment of $400,000 in cash, was given as part of the prosecution case by Michael and Loukis Georgiou.

13 Michael Georgiou

14 Michael Georgiou, who was the recipient of a certificate under s 128 of the *Evidence Act 2008* protecting him against self-incrimination, gave evidence that in the early 1990s, he and his brother Loukis were joint directors and shareholders of Larnaca Holdings Pty Ltd ('Larnaca'). That company was principally involved in property development. Larnaca had purchased the land at Kororoit Creek Road. He said that he could 'not really' remember when it was bought or how much it had cost, although he recollected that it was $700,000 or $750,000.

15 The property was held for 'three or four years — two or three years' before it was sold. The witness said that they were approached by an agent who told them that 'he had somebody interested in buying the property'. They then met the appellant, who was a solicitor in Williamstown. Michael Georgiou thought that 'the price on

the contract was $555,000', consisting of a $5000 deposit and a balance of $550,000. He said that 'there was a big cash consideration'. When he made his statement to police, he believed it to have been $250,000, but later 'worked out' that 'it would've been more like $400,000'. The 'final sale price' of the Kororoit Creek Road property 'would've been $955,000'. Mr Georgiou then identified a Contract of Sale for the land, dated 9 August 1994, signed by his brother on behalf of Larnaca.

16 At that first meeting at Loukis Georgiou's home, a man had turned up with a briefcase containing $50,000 in cash. Michael Georgiou later identified Lanciana's photograph from a police photoboard as the man with the briefcase. That $50,000 was the first payment 'in reduction of the purchase price'. The way that they 'structured' the contract was that it was a blank contract prepared by the solicitors, with 'the actual purchase price' included, and then 'each time cash was received the purchase price was altered' and 'reduced according to the amount that was received' until it 'got down to $555,000'. Michael Georgiou said that the 'original contract which kept being amended' was retained by the brothers, with the appellant also retaining one copy for himself.

17 Loukis Georgiou

18 Loukis Georgiou also gave evidence with the protection of a s 128 certificate. He thought that he and his brother originally paid 'under' $200,000 for the Kororoit Creek Road property, but acknowledged that he was not sure of that figure. In 1994 they had sold the property to the appellant. Negotiations took place at an estate agent's office in Northcote, and the negotiated price was 'about nine or 950, a million or something like that'. The prosecutor showed the witness the Contract of Sale indicating a purchase price of $555,000, but Loukis Georgiou said that the actual price was around the $900,000 mark. He said there was an additional contract which contained the actual purchase price. There was a cash component which was 'something like' the difference between $555,000 and $900,000. When cash payments were made, they would alter that contract's purchase price downward. There 'were three or four [payments] altogether'. He had received some of the cash payments,

including on an occasion at the appellant's home when he collected what 'might've been $100,000 something'.

19 In cross-examination, Loukis Georgiou identified his signature on a receipt dated 9 August 1994, which was in the following terms: '9/8/94. Received from John Anile re 1–3 Walter Street, Williamstown, $200,000 [signature] Loukas [sic.] Georgiou'.

20 Witness U[7]

21 Witness U met the appellant through Lanciana in the early 1990s. After many years, and at the request of Victoria Police, he arranged to meet the appellant at a café. Between January and October 2013, he regularly conversed with the appellant whilst wearing a covert recording device that the police had provided. The prosecution relied heavily on the recorded conversations between the two men to show that the appellant had, as alleged, paid the Georgious $400,000 in cash in 1994, knowing that it had been obtained by Lanciana through criminal activity.

22 Witness U gave evidence that he became involved in the Kororoit Creek Road development with Lanciana in early 1997. He believed that the appellant's involvement in the development had come to an end at about that time, an event in which he had no involvement. He took over the appellant's half share in the development, and by May 1997 he and Lanciana each had a 50 per cent share. The development consisted of 31 land subdivisions with various single and double-storey townhouses being built. Witness U said that his relationship with Lanciana had started well, but turned sour in mid to late 2002. From early 2003 until the end of 2011, he and Lanciana were constantly involved in civil litigation.

23 Witness U said that in late 2012, he was contacted by Victoria Police in relation to certain unspecified property developments and business dealings. Primarily because of his previous history with Lanciana, he agreed to assist the police in the investigation that they were conducting.

[7] Witness U's identity was the subject of a suppression order at the trial.

24 All of the meetings he had with the appellant were at the instigation of Victoria Police. He would never go to a meeting without wearing a recording device. Recordings of conversations between Witness U and the appellant during 2013, including on 30 January, 7 February, 7, 9 and 25 March, 1 May, 14 June, 12 July, 1 and 26 August, and 3 October, were played to the jury. Witness U commented upon certain aspects of those recordings. It is not practical, having regard to their length, to set out the conversations in detail.

25 One excerpt will, however, suffice to provide some of the flavour of much of what the recorded conversations contain. On 30 January 2013, the appellant told Witness U:

> We paid $955,000 for the block. When we bought the block we did a deal with some – two really nice Cypriot guys who owned the block [in] Doncaster. Anyway, negotiated a deal, 955,000 for the whole lot. … We had a contract for 555,000 … and 400,000 cash. … Which came from Percy. … 400 cash, right? Let me put it this way, they did something that gave them a lot of cash, you can join the dots if you want … Well, you join the dots, I'm not gunna say … but you join the dots.

26 Other evidence in the prosecution case included that of a stamp duty assessor from the State revenue Office, Barry Emsley. He gave evidence from which the prosecution invited the jury to infer that the stamp duty avoided through not declaring the $400,000 cash component of the purchase price had been $14,888.

Evidence in the defence case

27 <u>The appellant</u>

28 The appellant had practised as a solicitor for 35 years, and considered himself to be an expert in property matters. He estimated that, prior to 1994, he had developed half a dozen properties, 'maybe a few more'. With respect to the purchase of the Kororoit Creek Road property, the appellant said 'this transaction [is] very different to any one of us buying or selling a home … because it's a land developer [scil, development?] contract' and 'it's a far more complex contract as far as that's concerned'.

29 The appellant said that Lanciana had been 'a very close friend' in 1994. Prior to the actual purchase of the property, Lanciana had contacted him and told him that he had heard that the property had been rezoned from industrial to residential. The appellant did some research and was satisfied that, despite the land having previously been a rubbish tip, it could be built on. He wanted to develop it, and he invited Lanciana 'to become part of the project … because he found it, and he said he had $200,000 to contribute to it'.

30 The appellant said that he had arranged, through an estate agent, for a meeting with the vendors of the property. He attended a meeting with the Georgious — whom he had not previously known — at an estate agent's office in Sydney Road, Coburg. Before he went to the meeting and negotiated with the Georgious, he obtained a land tax certificate, which he regarded as a good indicator of the value of the property. The land tax valuation was $594,000.

31 The appellant managed to negotiate a contract price around that figure. He then negotiated 'an extra amount' of $200,000 payable to the vendors for 'other matters'. This 'extra money' was to enable him to take possession of the property immediately, rather than at settlement, so as to subdivide it. The appellant said,

> … you've actually got to put into a vacant land, vacant block, you've got to put the roads in, you've got to put the power, the gas, the water, the electricity. You've actually got to physically put the infrastructure in. So I'm saying to a vendor can I pay you so much and I'll pay you this extra amount but you need to let me go in and deal with your property.

32 When the appellant asked Lanciana where he got the cash from, he was told that part of it had come from the sale of rare comic books and the rest from 'anyone who had a heartbeat', signifying that the money had been borrowed from various other individuals.

33 The appellant gave evidence that he had drafted Special Condition 10 of the Contract of Sale. It provided for an amount of $60 per square metre payable for 'additional services'. That 'extra amount of money is not … part of the purchase price', it is for 'additional services which is not part of the purchase price'. The $200,000 was for

these 'additional services'. It had therefore not attracted stamp duty, since it was 'not dutiable unless it's part of the purchase price'. He said that 'an amount of money for additional services is never dutiable'.

34 Having obtained a copy of the Contract of Sale — including Special Condition 10 — the appellant went to Loukis Georgiou's home to sign it. The appellant said that it was 'nonsense' to suggest that Lanciana had attended the meeting. Before the meeting, however, Lanciana had given him a bag with the cash in it. It was then that he asked Lanciana where the money had come from and was told by him that it had come from the sale of some valuable comics, and loans from various individuals. At that time, Lanciana was his friend, so he had no reason to doubt that what he was told was true. At Loukis Georgiou's house, the contracts were signed and a receipt for the $200,000 cash was prepared. All of the handwriting on the receipt, the appellant said, was his, except for Loukis Georgiou's signature.

35 The appellant's evidence was that the receipt for $200,000 was later provided to his accountant, John Papazisis. The cash, which had been paid to the Georgious, was treated as a company expense, and was declared for taxation purposes. It was treated in the accounts as a contribution by Lanciana to the company, because it was Lanciana's money.

36 After development of the land was underway, Lanciana went to prison for his involvement in a substantial cannabis growing enterprise. During that time, difficulties arose between him and the appellant. Lanciana wrongly accused the appellant of stealing money and materials from the Kororoit Creek Project, and harassed and threatened him from gaol. As a result, the appellant quit the project on 9 April 1997, at which point Witness U took over the appellant's interest.

37 The appellant said that he was angry about the way in which he had been forced out of the development. It was a multi-million dollar project which he had anticipated would set him and his family up for life. He had devoted two years to the project at the expense of his solicitor's practice. His attitude towards Witness U was that he

was a 'vulture' who had 'swooped in to take over the project'. The appellant said, 'he stole my project'. He was angry 'in equal parts' with Lanciana and Witness U.

38 When Witness U came to the appellant's café on 30 January 2013, the appellant was curious as to why, after all this time, he wanted to talk to him. Witness U indicated that he wanted the appellant's help. The appellant said that he was never going to help Witness U, but had played along with him so that he could 'drop the hammer on him', and thereby gain a measure of revenge.

39 Witness U kept coming back to the café to speak with him. According to the appellant, the 'more he came back the more desperate [the appellant] thought he was and the more pleasure [he] got out of it'. Towards the end of the conversations, however, the appellant began to suspect that Witness U was going to the police and passing on to them the 'nonsense' that he had been feeding him. The appellant 'tried to do a bit of back pedalling', but realised it was 'too late'. What he had said to Witness U was 'crap'.

40 The appellant's evidence was that the figure of $400,000 that he mentioned to Witness U was simply him 'bullshitting'. There was no reason why he picked that particular figure, it could have been any amount. The real cash component had always been $200,000. To the appellant's mind, there 'was nothing illegal' in the manner in which Lanciana had obtained that money. Even to this day, he still did not believe that the money had come from an illegal source.

41 After his arrest, the appellant begged police to obtain an expert opinion on stamp duty. He said that he told the police repeatedly that there had been no underpayment of stamp duty, and had explained to them how stamp duty law worked. The suggestion that he had hidden the $200,000 cash betrayed a misunderstanding of contract law. He had not defrauded the stamp duty office. In fact, he had done the opposite, having fully disclosed the payment of that sum. He said that stamp duty on a purchase was calculated by the vendor's solicitor, having regard to the whole contract. The reason why the $200,000 in cash paid to the

vendor had not been included for stamp duty purposes was because that sum was not dutiable.

42 In response to the allegation that he had laundered $400,000 for Lanciana, the appellant insisted that the amount had been $200,000 and he maintained that it had not been laundered. He said that the sum paid in cash had been fully documented. He had given the vendors $200,000 in cash, asked for a receipt, and obtained one. That payment had, implicitly at least, been declared in the contract.

43 In cross-examination, the appellant was asked about the receipt for $200,000 that he claimed had been signed by Loukis Georgiou at the time the cash was handed over. It will be recalled that Georgiou himself had acknowledged that the document bore his signature. Nonetheless, the cross-examination went as follows:

> Q: And you whip out or you prepare a handwritten note on the night at the house?
>
> A: Yes.
>
> Q: How many deals have you done involving either $200,000 or $400,000 cash back in August of 1994?
>
> A: None.
>
> Q: And that's all you got in terms of that exchange of the $200,000?
>
> A: Yes. Well what else could I have?
>
> Q: Someone else didn't sign Loukis Georgiou's name on that document did they?
>
> A: No, Loukis Georgiou signed it, the second brother that gave evidence.
>
> Q: Are you sure about that?
>
> A: Yes I was there. I wrote it, he signed it.

44 Also in cross-examination, the appellant was asked about Lanciana's previous conviction on a drug matter, in respect of which the appellant had represented Lanciana. The appellant had described him as 'simply a house sitter' who had been taken advantage of by others. The prosecutor challenged the appellant regarding that evidence, noting that Lanciana had been described by the judge who sentenced

him as 'a willing and important participant in the team' concerning the cultivation of cannabis.

45 However, the prosecutor went on to put to the appellant, specifically, that the cannabis crop had an estimated street value of $2.295 million. This led to an exchange between them whereby the prosecutor suggested that the appellant had misled the jury by suggesting that Lanciana had been involved in a much smaller criminal enterprise than was, in fact, the case.

46 During the course of this series of questions, the prosecutor had in his possession a copy of the judgment of the Court of Appeal, dated February 1996, concerning Lanciana's appeal against his drug conviction.[8] The cross-examination of the appellant on this topic was extremely detailed, running over several pages of transcript. The prosecutor referred specifically to the findings of the Court of Appeal in that matter. In particular, he referred to an observation by the trial judge who had dealt with Lanciana, 'when Mr Lanciana, your very close friend, your client was sentenced'. The reference to Mr Lanciana having been the appellant's 'very close friend' was gratuitous. It seems to have been intended, by innuendo, to smear the appellant through his past association with Lanciana.

47 It was at this point that defence counsel finally, and for the first time, took objection to the prosecutor's cross-examination of the appellant. The objection was put on the basis of lack of relevance. However, the trial judge overruled it. The prosecutor then confirmed with the appellant something that had already been openly announced in court, namely that Lanciana was to be called to give evidence for the defence.

48 <u>David Ogilvie</u>

49 David Ogilvie gave evidence as to the principles governing stamp duty, as applicable in 1994. His evidence was that stamp duty was not payable on additional services of the kind contemplated by Special Condition 10, such as for early access to the property so that subdivision could commence at once.

8 *R v Lanciana* (1996) 84 A Crim R 268.

50 Adele Anile

51 Mrs Anile said that she and the appellant had been married for some 28 years. She gave evidence that on an unspecified occasion, police had attended at her home. She invited them in and they had had a discussion. They did not have a search warrant, but she had offered to show them around. When they approached the study, she told them to be careful as there were some kittens inside that were ill with ringworm. The police officers had a cursory look through some drawers and files, and had then moved on to the next room.

52 Subsequently on 17 March 2014, well after the appellant had first been arrested, police had attended her home with a search warrant. They had come at 6.00 am when both herself and the appellant had been asleep. They searched the house, arrested the appellant a second time, and took him to the police station.

53 Mrs Anile also gave evidence as to how she came across some documents which later became significant in the defence case. She described the layout of their home in Williamstown. The study was a room at the front of the house. Over the years, the room had barely been used, and had never been used as a study. It had become a 'junk' room.

54 About 11 years ago, she had begun doing animal rescue work. She had started using the study to house sick and injured wildlife. Apart from the animals that were kept there, the room contained books, a computer, piles of paperwork, a chair, two filing cabinets, a lamp and some magazines. It was very messy.

55 Six months before giving evidence in the trial, Mrs Anile and her husband had prepared their home for sale. Between January and April 2017, she had begun clearing out the study. She found old house plans, and her daughter's old school reports in a folder. Intent on keeping the documents to show her husband, she put them to one side. She did not really look at them, save by way of a cursory glance. She did not add or remove any documents.

56 Later that night, when the appellant arrived home, she gave him the folder of documents. He had said to her, 'it's really good that you found this'. He told her that the documents related to the building plans for the Kororoit Creek Road project, and that he had not been able to locate them by his own searches.

57 Mrs Anile recalled that at about the time of that project, she had overheard her husband speaking with Percy Lanciana while he was visiting their house. They were sitting at the dining table and she was either in the kitchen, or seated on the couch. She recalled them having discussed Lanciana bringing money over for the Kororoit Creek transaction. Specifically, she recalled a sum of around $200,000 having been discussed.

58 The witness explained that things 'went really downhill' in relation to that project. By that stage, Lanciana was in prison. She was frightened because people were calling their house at all hours of the day and night.

59 Eventually, the appellant came home one night and told her that he was no longer involved in the Kororoit Creek Road project. She said that he was 'really, really upset'. When she asked him why he had quit the project, he had said 'I was made an offer that I couldn't refuse'. When she asked what he meant, he had told her that he was referring to the movie, *The Godfather*, in that he had been made an offer that he 'either accepted … or else'.

60 In cross-examination, Mrs Anile was shown a file. She said that she did not recognise the yellow folder, but that it had her hand writing on it. She confirmed that it was the file that she had found in the study of her home.

61 The front of the file said 'Elizabeth Terrace'.[9] She knew by the time that she found the file that her husband had been charged in relation to dealings with that property. She maintained that she had not looked closely at the file because she thought it contained nothing more than building plans and receipts.

[9] Elizabeth Terrace was another name used to describe the Kororoit Creek Project.

62 Also in cross-examination, Mrs Anile was asked a series of questions about a lady by the name of Jeanette ('Jinny') Sharp. Those particular questions form the basis of ground 2(b) of this application. We shall return to them when we deal specifically with that ground.

63 Percy Lanciana

64 Percy Lanciana was the next witness to give evidence on behalf of the defence. Counsel for the appellant had requested that he be called by the prosecution, but that request had been denied.

65 Before summarising Lanciana's evidence in-chief, it is necessary to set out a number of background matters that give context to the grounds of appeal. Lanciana had previously been called to give evidence on behalf of the defence in committal proceedings in February 2015. He had been cross-examined at some length on that occasion by counsel for the prosecution. In November 2016 after the appellant's committal, but well before his trial, Lanciana was charged with having committed an armed robbery upon an Armaguard van in 1994, in Richmond. He had also been charged with money laundering, it being alleged that he had used the proceeds of that armed robbery in order to acquire his share of the Kororoit Creek Project. In other words, the cash paid over to the Georgiou brothers by the appellant was said, in the case against Lanciana, to have been part of the proceeds of that robbery.

66 The following background matters relate to the grounds concerning prosecutorial non-disclosure, improper cross-examination of defence witnesses, alleged incompetence of counsel, and errors said to have been made in the judge's charge.

67 First, it will be recalled that the prosecution had amended the indictment against the appellant. It was no longer contended that the $400,000 cash, said to have been paid to the Georgious, could be linked to the Armaguard robbery. The case was opened to the jury on the basis that the cash was the proceeds of unspecified, but serious, criminal activity.

68 Secondly, as indicated, Lanciana had given evidence in favour of the appellant at the committal hearing in February 2015. He had not, by that stage, been charged with the 1994 robbery, or money laundering. He was not so charged until November 2016.

69 By the time of the appellant's trial, Lanciana was relevantly 'an associated accused' within the meaning of that expression in the *Evidence Act 2008*. However, he was to be tried on the charge of money laundering separately from the appellant. Indeed, the charges against Lanciana were listed for a committal hearing in October 2017, several months after the appellant's trial.

70 Thirdly, defence counsel had sought to persuade the prosecutor that it was the Crown's duty to call Lanciana as a witness in the appellant's trial. The prosecutor, having legitimately formed the view that Lanciana was an untruthful witness, declined to call him. That left the choice as to whether to call Lanciana as a defence witness with the appellant.

71 Fourthly, and not surprisingly, Lanciana strongly objected to giving evidence in the appellant's trial. He indicated, through counsel, that if called he would claim the privilege against self-incrimination. Self-evidently, in the circumstances, there were reasonable grounds for that objection.

72 It was therefore necessary for the trial judge to determine whether, pursuant to s 128(4) of the *Evidence Act 2008*, Lanciana should be required, in the interests of justice, to give evidence. Of course, the *quid pro quo* of his being called as a witness was that he would be given a certificate which would prevent any answers that he might give from being used against him in subsequent proceedings.

73 Fifthly, the trial judge having heard argument on this issue, ruled that it was 'in the interests of justice' for Lanciana to be compelled to give evidence on behalf of the defence, should they want him called. His Honour described Lanciana's evidence as 'very important', so far as the defence case was concerned, no doubt meaning potentially important if he were to be believed. Lanciana had by this stage provided

the defence with a written statement dated 7 April 2015, in which he gave an account of events that was broadly similar to that of the appellant, and was to that extent potentially exculpatory.

74 Sixthly, the trial judge noted that the decision on the part of the defence to call Lanciana had apparently been made at a very late stage. It seems that the defence may have been vacillating as to whether to risk calling him, right up until the moment the defence announced its course to the jury.

75 Seventhly, in his ruling, the trial judge noted that the defence had, at one stage, foreshadowed the possibility of seeking to tender a transcript of Lanciana's evidence given at committal rather than calling him as a witness in the trial. This was on the basis that, having regard to Lanciana's position, now facing trial himself, he was relevantly 'unavailable' to give evidence for the defence in the appellant's trial. As his Honour observed, that matter had not been determined. However, the prosecution had made it clear that it would oppose any such tender.

76 Eighthly, after Lanciana had been charged in November 2016, it emerged that there were in existence a significant number of transcripts of conversations between himself and a woman designated as Witness O. These conversations had been covertly recorded by that woman throughout much of 2016. This was all done at the behest of the police. The transcripts had been available to the prosecution in the appellant's trial from shortly after November 2016. So too, had been a Summary of Evidence, which ran for some 56 pages and contained a summary of the transcripts.[10]

77 Ninthly, the first intimation that defence counsel was given that material of that kind existed was during the course of the appellant's evidence. A copy of the 56 page Summary of Evidence was emailed to him by the solicitor for the prosecution at 5.26

[10] It was expressly conceded before this Court by counsel for the respondent that this material had been available to the prosecution in the appellant's trial for the best part of six months, from about November 2016. Neither the transcripts, nor the summary, were disclosed to the defence until well after the prosecution case had closed, as will be seen when we deal with the non-disclosure ground of appeal.

pm on the night of 30 May 2017. Earlier that day, the prosecution case had closed, and an unsuccessful no case submission had been made. At that point, defence counsel had identified the witnesses who would be called on behalf of the appellant, including specifically Lanciana.

78 Regrettably, although defence counsel became aware of the email at approximately 10.56 pm that night, he did not read it. He merely forwarded it to his instructing solicitors, who did not read it either. In an affidavit filed in this Court, defence counsel indicated that he was focused on the defence case at the time, and was also concerned about the appellant's health. The appellant had had a heart attack during the course of the trial several weeks earlier.

79 Tenthly, when the prosecutor first mentioned the Summary of Evidence in court, he informed the trial judge that it would be sufficient for his purposes if his Honour looked only at pages 54–56 of that document.[11] He intimated that there was nothing else of any particular relevance in the material.

80 It was submitted before this Court that defence counsel may well have taken what the prosecutor had said as an indication that there was no need for him to read the entirety of the Summary of Evidence, still less to seek out the actual transcripts of the discussions between Lanciana and Witness O on which the summary was based.

81 It follows from the fact that defence counsel did not, at any stage, read the Summary of Evidence that he did not seek to make use of those parts of it that might have been of some assistance to the defence. For example, Lanciana was never asked in-chief about his having repeatedly told Witness O (at a time when he could not have been aware that he was being secretly recorded), that the appellant had been unaware of the source of the cash provided to him in 1994. Nor did the defence become aware, from the Summary of Evidence, of the other documents to which reference is made in ground 1A(ba) and (c).

[11] These were not the critical pages of the Summary of Evidence, so far as its potential exculpatory effects were concerned.

82 Turning then to Lanciana's evidence in-chief, he made it clear that had become good friends with the appellant in the early 1990s. He said that in 1994 he became interested in purchasing the Kororoit Creek Road property, having become aware that the land was to be rezoned to residential (previously it had been industrial or commercial). He asked the appellant to look into the property and get back to him about it. The appellant had carried out some preliminary investigation and had then made contact with the owners. According to Lanciana, he did not at any stage actually meet the owners.

83 Lanciana's evidence was that the appellant had told him that the vendors wanted Lanciana's contribution, which was to be $200,000,in cash. Lanciana was concerned about what paying that amount in cash would mean for him. However, he told the appellant that he would make the payment in that form, so long as he would be provided with a receipt from the vendors for the $200,000 cash.

84 Lanciana said that the $200,000 that he contributed to the purchase came from several sources, all of them lawful. He claimed that Witness U had given him $30,000 cash. His brother-in-law had given him just under $100,000, and another individual, whom he named, had also provided him with some cash. He said that he had an interest in rare comic books at the time, some of which were 'quite valuable'.

85 Lanciana's evidence was that he had been open and truthful with the appellant regarding the source of the cash. He said that the appellant would have had no reason at that time to doubt him. He gave the cash to the appellant on the day that the appellant went to Loukis Georgiou's premises and signed the contract, which would have been 9 August 1994. The money was in some sort of bag which he took to the appellant's office earlier that day. He said that he did not accompany the appellant when he went to sign the contract.

86 Lanciana acknowledged, in evidence in-chief, that he had been convicted in 1995 of trafficking in cannabis and theft. He further acknowledged that the appellant had acted as his solicitor in relation to those matters. His recollection was that he had

been arrested in either 1992 or 1993, and that the appellant had become aware of the drug matters shortly after his arrest. Hence, the appellant knew about the charges Lanciana was facing when the idea of purchasing the property first arose.

87 It was Lanciana's evidence that he and the appellant had a falling out in 1996. The appellant had visited him in prison for the purpose of discussing issues in relation to the Kororoit Creek Road development. Lanciana had been getting reports from plumbers working on the site that things were not going well there, and he was concerned. He asked the appellant to withdraw from the project, and their partnership was terminated during that visit. Ultimately, Lanciana received the appellant's interest in Anile Residential Pty Ltd. Witness U had no entitlement to any interest in the venture, but he had somehow become involved, claiming a half share. According to Lanciana, this was just another example of Witness U's many lies. To this point, Lanciana's evidence might have been regarded, if he were to be believed, as being of some assistance to the defence.

88 Lanciana was cross-examined by the prosecutor. That cross-examination forms the basis of ground 2(a), aspects of ground 7, and also of ground 9 of this appeal. We will set out the key passages to which objection is now taken when we come to deal with those grounds of appeal. However, one thing can be said for certain. The decision to call Lanciana turned out to be a complete disaster so far as the defence was concerned.

89 Peter Russo

90 Peter Russo was an Australian lawyer called by the defence. He was not formally an accredited specialist in conveyancing, but had done a lot of work, including teaching, in that area. He had known the appellant since university, when they attended college together. He had also had professional dealings with him over the years.

91 Mr Russo was shown the contract of sale for the Kororoit Creek property. He agreed that the price shown was $555,000, including a deposit of $5000. He interpreted

Special Condition 10 as providing for an additional payment in consideration of the property being subdivided. He summarised the effect of that condition as follows:

> … it basically says that if the purchaser obtains a plan of subdivision…the vendor, agrees to give [the purchaser] at any time, following approval of that plan … it would enable him … upon paying the vendor an amount of $60 for a square metre … it will basically permit him to … subdivide or split up the land into separate Titles.

92 Mr Russo acknowledged that that arrangement was not explicitly conditioned upon the subdivision actually being approved. He later accepted that the 'trigger' for the operation of the condition was the approval of the Registrar of Land Titles to a plan of subdivision.

93 In terms of the $200,000 cash payment being reflected in Special Condition 10, Mr Russo said that the payment of that sum was tied to the opportunity to subdivide. It was the sum of the square metreage multiplied by $60. According to the contract, if the subdivision did not go ahead, the $200,000 would not change hands, although in this case it already had.

94 In terms of the effect of the condition upon the payment of stamp duty, the witness said that any sum advanced pursuant to that condition was for additional services over and above the sale price. According to the legislation in 1994, stamp duty was not payable on monies paid for such services.

95 The witness said that his view was supported by the opinion of the 'State Revenue Office specialist', meaning Mr Ogilvie. He said that 'the law of stamp duty changed more often than you change your socks'. He said that the State Revenue Office would have noted Special Condition 10, understood its meaning, and dealt with it accordingly.

96 Under cross-examination, the witness agreed that the square metreage (12,140 m^2) multiplied by $60 was approximately $728,000. He agreed that he could not get to a sum of precisely $200,000, on top of the contract price, in accordance with Special Condition 10.

97 The witness said that a month or so prior to the trial, he had met with the appellant and Mr Ogilvie. He said that they had discussed the transaction as a whole and particularly, the contract. The witness said that he had done so in order to 'brush up' on his knowledge and clarify certain matters, such as the amount of money that had been paid.

98 The witness also said that, prior to the trial, he had learned of a receipt for $200,000, dated 9 August 1994, which was the date the contract was signed. The prosecutor suggested to the witness that when the $200,000 cash was paid on that day, Special Condition 10 could not have already been triggered. The witness agreed.

99 Mr Russo said that although there was no explicit reference to additional services in Special Condition 10, that was clearly to be implied.

100 In re-examination, defence counsel asked the witness to add the cash payment ($200,000) and the contract price ($555,000). The total was $755,000. If that were divided by the square metreage (12,140 m²), the figure would be about $62, which was close to the $60 figure mentioned in the condition.

101 <u>John Papazisis</u>

102 John Papazisis, who had been the appellant's accountant since 1994, including when the Kororoit Creek property was purchased, also gave evidence. Mr Papazisis said that he knew that Lanciana was a partner in the project. He recalled that the appellant and Lanciana had come to his office and advised him that they had purchased a property which they wished to develop. They told him that a component of the purchase price had been the sum of $200,000 in cash, for which they had a receipt. They proposed to set up a company to manage the project. They wanted the cash payment to be included in the accounts. The money was to be reported to the Australian Taxation Office as an expense.

103 Mr Papazisis said that, in 1994, the appellant had been a man of means. He had been a successful solicitor and property developer.

104 At a later stage, he remembered the appellant having come to his office looking dishevelled and distressed. The appellant told him that he had been forced to terminate his involvement in the project. He had made it clear that he hated Lanciana. He also told Mr Papazisis that Witness U had taken over his interest in the project against his will.

105 According to Mr Papazisis, the appellant obviously disliked Witness U. In his evidence, Mr Papazisis said that he was worried at the time about the appellant being under a lot of strain, and experiencing anxiety and depression. He testified as to the appellant's good character.

106 Other character evidence in the defence case was given by a number of witnesses, including a then Queen's Counsel. Their evidence spoke of the appellant's general reputation for honesty.

Ground 1A — Prosecution failure to disclose

107 This ground can be broken up into three separate parts. Far and away the most important is the contention that the Crown failed in its duty by not making full and timely disclosure of the recorded covert conversations between Lanciana and Witness O, which it will be recalled had been in the possession of the prosecution since about November 2016.

108 There had been subpoenas issued on behalf of the defence in both February and April 2015 calling for the production of documents, including audio recordings of the very kind involved in the conversations between Lanciana and Witness O. However, as we have said, those conversations did not take place until 2016. They were not, therefore, directly caught by the subpoenas.

109 The other documents which form the basis of grounds 1A(ba) and 1A(c), and which it is now said ought to have been disclosed, are of less significance. They do include, however, the statutory declarations made by Michael Georgiou, which were embedded within the documents that the police had seized.

110 There were a vast number of documents in the possession of the police, more than 17,000 it would seem. We were also told that at various stages there were discussions between the defence and representatives of the Attorney-General as regards other documents that might be relevant to the defence over which public interest immunity would be claimed. At the time of these discussions, they would not have included the covert recordings of the conversation between Lanciana and Witness O since these had not yet taken place. Moreover, those conversations would have been the subject of a claim for public interest immunity throughout most of 2016 because they concerned an ongoing police investigation. Once Lanciana was charged, however, any claim of public interest immunity could no longer be maintained

111 We have already outlined how disclosure of the Summary of Evidence concerning Lanciana and Witness O ultimately took place. Defence counsel has sworn an affidavit in which he outlined the circumstances under which that summary was emailed to him on 30 May 2017.

112 On the late afternoon of 31 May 2017, the prosecutor applied to the judge, in the absence of the jury, for leave to cross-examine the appellant regarding the charges that had been laid against Lanciana. These charges, of course, included armed robbery and money laundering. In doing so, the prosecutor referred to those charges, but did not produce the actual charge sheets.

113 Those charge sheets were not made available until on or after 5 June 2017. It must be remembered that the prosecution had earlier sought and obtained leave to amend its opening to remove any reference to the Armaguard robbery as being the designated source of the cash used to purchase the Kororoit Creek property.

114 According to defence counsel, in his affidavit, the withdrawal of the allegation concerning that robbery as the source of the cash made it unlikely, in his mind, that the issue would arise in the cross-examination of Lanciana. It also made whatever might be contained in the Summary of Evidence, in the case against Lanciana, seem

to him to be less relevant. In those circumstances, he decided that it would be sufficient for his purposes if he were simply provided with a copy of the charges laid against Lanciana, and nothing more.

115 According to defence counsel his views regarding that matter were fortified by the fact that the prosecutor, when referring to the Summary of Evidence on 31 May 2017, said to the trial judge,

> … now your Honour doesn't have to read all of it. In essence there is one page that sets out or two pages that set out the nature of those allegations.

116 Moreover, the prosecutor informed the trial judge that the argument that was being conducted regarding leave for cross-examination was about the armed robbery alone. That was despite the fact that there was a money laundering charge in existence against Lanciana in relation to 'the very transaction that Mr Anile ha[d] been accused [of]'. His Honour then enquired, 'but what we're dealing with is, armed robbery, June 1994?'. The prosecutor answered 'yes'.

117 As previously indicated, the trial judge ruled against the prosecutor's application to cross-examine the appellant in relation to the charge of armed robbery that had been brought against Lanciana. In these circumstances, defence counsel deposed in his affidavit, that he did not consider it necessary to read any of the remaining parts of the Summary of Evidence.

118 Defence counsel said that he was unaware throughout the trial of any of the documents referred to at pages 27–30 of that summary. These were the very documents that pertained to the Kororoit Creek project and were potentially of real importance in the trial. He only saw those documents after the appellant had been convicted. At that point, he learned for the first time that both Michael Georgiou and his brother Loukis had departed from what the prosecutor had intimated they would say in his opening. Defence counsel discovered that in their earlier statements, they had referred to two separate contracts, one being in an amount of $900,000 with the possibility of it having been backdated.

119 Accordingly, defence counsel said that he had not sought, prior to trial, to obtain copies of additional contracts from the prosecution, though the statements suggested that they had existed.

120 In addition, defence counsel knew nothing of the statutory declarations sworn by Michael Georgiou referring to a single contract in the amount of $555,000. These statutory declarations, the existence of which would have become clear had defence counsel read the relevant parts of the Summary of Evidence, could have been utilised in the cross-examination of the both Michael and Loukis Georgiou.

121 Finally, and most importantly, defence counsel said he was unaware throughout the trial of the documents set out at pages 46, 47, 49, 51 and 52 of the Summary of Evidence. He knew nothing of any conversations involving Lanciana and Witness O until after verdict. He deposed:

> Had I known of those matters, I would have applied to discharge the jury [and] to begin the trial again. I would have run the trial differently.

122 The Summary of Evidence to which defence counsel referred is, as we have previously said, a 56 page document. It sets out in some detail what was known as 'Operation Tideland'. This was an investigation that had begun in 2012 and was said to be ongoing. It targeted an organised crime syndicate that was alleged to have been responsible for murders, armed robberies, and other very serious crimes, including money laundering. It referred to the use of telephone intercepts and listening devices. It identified Lanciana as having been involved in the Armaguard robbery in 1994.

123 The Summary of Evidence noted that Lanciana had previously been married to Maryanna Lanciana, who had been shot dead in July 1984. It noted also that no one had been charged with her murder. It went on to say that Lanciana had paid very little tax between 1998 and 2012, that he did not appear to have a regular income, and that he had not lodged a tax return for at least seven out of those 15 years.

124 The Summary of Evidence went on to describe the main features of the Armaguard

robbery, and the investigation that had taken place in relation to it. It specifically linked the robbery to the appellant's purchase of the Kororoit Creek land, alleging that $400,000 in cash (being proceeds of the robbery), had been paid to the vendors in addition to the designated contract price of $555,000. This particular event was described as a combination of money laundering and avoidance of stamp duty.

125 The Summary of Evidence then contained a lengthy discussion of a statement which had been obtained from a Witness T, who was involved in the Armaguard robbery, and who had decided in 2012 to turn against his co-offenders.

126 It seems that in the course of this investigation into Lanciana and others, the police also examined the appellant's activities in 1994. It was in these circumstances that, on 30 January 2013, Witness U was sent out to meet with the appellant at his café. As indicated, that conversation and all subsequent conversations between them were covertly recorded.

127 The Summary of Evidence also contained a series of extracts from the recorded conversations, both those involving the appellant and Witness U, and those between Lanciana and Witness O. No mention is made in any of these extracts of the Armaguard robbery as such. Nonetheless, the appellant made it clear on a number of occasions that he had a fair idea of where the money may have come from. He acknowledged having paid $955,000, including $400,000 in cash, which 'came from Percy'. He invited Witness U to 'join the dots'.

128 This particular conversation, and a number of others of a similar nature, were no doubt potentially very damaging to the appellant if played before the jury. At the same time, however, there were other statements made by Lanciana which might have cast doubt upon whether the appellant really had any idea, in 1994, of where the cash came from or whether he was simply, as he claimed years later, 'bullshitting'.

129 Some of the material contained in the Summary of Evidence might conceivably have assisted the defence. For example, the appellant spoke about having completed the

sub-division and of having sold all the buildings by the time they were ready to settle. He claimed that it was only at that point that things started to go wrong, when Lanciana's friends, who were plumbers, became involved, and essentially took charge of the entire project.

130 The appellant made it clear to Witness U that he would never say where the cash came from. He said that he feared what might be done to him if he told anyone what he knew. At one point, he seemed to imply that the cash may have been the proceeds of drug offences, though that was never pressed. At another point, he said that Lanciana had obtained a large amount of money in around 1992, that being well before the Armaguard robbery.

131 Still later, the appellant told Witness U that if he were to indicate where the cash had come from, Lanciana would probably put a bullet in his head. He again raised the possibility that the money may have come from drugs, but then seemingly resiled from that particular suggestion.

132 The Summary of Evidence records that police executed a search warrant at a solicitor's office, at Basilone Law, solicitor, where they seized a number of documents. These included vendors' statutory declarations regarding the value of the property sold. The vendors attested to the sale price as having been $555,000. Had the defence been aware of the contents of the Summary of Evidence, they would certainly have been aware of the existence of these statutory declarations.

133 There were then a series of further recorded conversations between the appellant and Witness U. On 26 August 2013, in the course of one such conversation, he told Witness U that contrary to what he had previously said, the property had not been purchased with 'dirty money'. He added that there had been no cash involved in the deal, and he denied having previously told Witness U anything to the contrary. Self-evidently, that last comment, at least, was demonstrably false. The recordings spoke for themselves.

134 On 3 October 2013, the appellant again told Witness U that the discussions about

cash had all been 'garbage'. A good part of the rest of the Summary of Evidence concerns conversations between Lanciana and others regarding his involvement in the 1994 Armaguard robbery.

135 Among the conversations that were covertly recorded were those between Lanciana and Witness O. From about July 2014, Lanciana repeatedly told her that the appellant knew nothing about the armed robbery, and would not have known where the cash that Lanciana had given him had come from.

136 Over the next few days and particularly on 30 July 2014 Lanciana repeatedly stated that the appellant had known nothing about where the cash had come from. He insisted that he had never told the appellant that it was the proceeds of the robbery.

137 The last event noted in the Summary of Evidence was the arrest of Lanciana on 18 November 2016.

138 The actual transcript of the recorded conversations between Lanciana and Witness O runs for just over 200 pages. A careful reading of that transcript indicates that the Summary of Evidence, though generally accurate as regards the recorded conversations, was by no means exhaustive. The transcripts contained a number of references to the appellant, reaffirming repeatedly that in 1994 he had no knowledge of where the cash used for the land purchase had come from. Some of these references may have been of assistance to the appellant, had they been made known to the jury.

139 The duty which rests upon the prosecution to disclose to the defence any material that might be of assistance in meeting the charges brought is well established. The principles that govern that duty may be summarised as follows:

- the duty to disclose is one that is owed to the Court, and not to the accused;[12]
- the duty is to disclose, prior to trial, all material which can be seen on a sensible appraisal to be relevant, or even possibly

[12] *Cannon v Tahche* (2002) 5 VR 317, 340.

relevant, to an issue in the case;

- the duty is also to disclose, prior to trial all material which could hold out a real (as opposed to fanciful) prospect of providing a lead towards exculpatory evidence;[13]

- a failure to comply with that duty may, in some circumstances, give rise to a miscarriage of justice;[14] and

- the rule requiring disclosure applies in relation to material both in the possession of the prosecution, and material which it should obtain. In others words, the obligation to disclose includes, in an appropriate case, an obligation to make enquiries.[15]

140 Plainly, these rules are designed to ensure that the defence is provided with all material in the hands of the prosecutor which may, legitimately, assist the defence case. It has been said that non-disclosure has in the past been a potent source of injustice. It will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance, or opened up a new line of defence.

141 Nonetheless, the following general observations of Smith ACJ in *R v Lucas*[16] regarding the duties owed by the prosecution should be noted:

> For the purpose of establishing such an allegation of unfairness it is not necessary for the applicant to be able to point to the conduct of an identified person or persons concerned in the prosecution as having been blameworthy. It is sufficient for him to show that the totality of the acts of those concerned on behalf of the Crown in the preparation and conduct of the prosecution has operated unfairly against him.[17]

142 The relevant part of the Director of Public Prosecution's Policy on Disclosure that applied at the time of the appellant's trial[18] was in the following terms:

13 *R v Farquharson* (2009) 26 VR 410, 464 [213]. See also *R v Reardon (No 2)* (2004) 60 NSWLR 454, and *R v Spiteri* (2004) 61 NSWLR 369.

14 *Mallard v The Queen* (2005) 224 CLR 125.

15 *AJ v The Queen* (2011) 32 VR 614, 620 [22].

16 [1973] VR 693.

17 Ibid 696.

18 The Policy has since been amended from August 2017. The changes do not seem to be

> Subject to any claim of public interest immunity or legal professional privilege, or any statutory provisions to the contrary, the prosecution must fulfil its disclosure obligations under the *Criminal Procedure Act 2009* and disclose to the accused any other material which:
>
> (a) is relevant or possibly relevant to an issue in the case; or
>
> (b) raises or possibly raises a new issue whose existence is not apparent from the evidence the prosecution proposes to use; or
>
> (c) holds out a real as opposed to fanciful prospect of providing a line of inquiry which goes to (a) or (b) above.

143 The Disclosure Policy went on to say that the duty of disclosure did not extend to disclosing material that was relevant only to the credibility of the defence (as distinct from prosecution) witnesses, or relevant only to the credibility of the accused person himself.[19] This was plainly not the case in relation to the Summary of Evidence, the contents of which went far beyond the credibility of Lanciana or the appellant himself.

144 That Disclosure Policy accords with the principles laid down by King CJ in *Carter v Hayes*.[20] There, his Honour said:

> Disclosure by those conducting a prosecution of material in the possession or power of the prosecution which would tend to assist the defence case, is an important ingredient of a fair trial (*Clarkson v DPP* [1990] VR 745, 755) … it will often be necessary or at least desirable, in the interests of a fair trial, that the defence have access to the statements of witnesses and other evidentiary material in the possession of the prosecution **in advance of trial in order to prepare for cross-examination of prosecution witnesses and to prepare the defence generally**.[21]

145 It should be noted that the passage set out above makes it clear that the duty to disclose is not confined to material that bears upon the credit of prosecution witnesses, though that is sometimes mistakenly believed. Any material that might enable the defence to prepare its case properly, whether seemingly admissible in evidence or not, and whether considered by the prosecution to be more generally

material, save for the inclusion of a fourth category of disclosure that must be made, namely any material that 'is or is possibly exculpatory'.

19 Compare *AJ v The Queen* (2011) 32 VR 614; *Grey v The Queen* (2001) 75 ALJR 1708; *R v Lewis Hamilton* [1998] 1 VR 630. See also *R v Brown* [1998] AC 367.

20 (1994) 61 SASR 451.

21 Ibid 456 (emphasis added).

harmful to the accused than of assistance, must be disclosed. What use, if any, is to be made of that material is a matter for the defence, not for the prosecution.

146 Lanciana was to be a defence witness. He was never to be a prosecution witness. However, he had been called for the defence at the committal, and clearly had firsthand knowledge of the key matters at issue in this trial. The trial judge regarded his evidence as very important, so far as the defence were concerned. In these circumstances, the prosecution was under an obligation to disclose to the defence, well before the trial, the transcripts of his discussions with Witness O. These were, in many ways, central to the case against the appellant.

147 In the same way, the Summary of Evidence, which contained references to verbatim discussions between Lanciana and Witness O, ought to have been disclosed well before the trial. The fact that some of that material may not have been of any assistance to the defence, and much of it might have been positively harmful, was irrelevant. As indicated, it was a matter entirely for the defence how, if at all, that material might be sought to be used. The adage, forewarned is forearmed, is clearly applicable.

148 Had the defence been aware, prior to trial, of what Lanciana had said to Witness O (particularly given that he had no idea that he was being covertly recorded), counsel could have made an informed decision as to whether or not Lanciana should be called to give evidence. The risks of doing so were apparent. However, the risks were in fact far greater than might have been appreciated, having regard to the use that might have been made of the covert recordings in cross-examining Lanciana.

149 In our view, there was no justification whatsoever for not disclosing this material until well into the trial, after the defence had announced its course. By that stage, the die was well and truly cast. The jury had been told that Lanciana would be called as a defence witness, and they would have understood that his evidence was likely to be of pivotal importance.

150 As we have said, Lanciana was a disastrous witness for the defence. The decision to

call him was nothing less than catastrophic. We have no reason to doubt defence counsel's assertion in his affidavit that had he been aware, prior to trial of the Summary of Evidence and the transcripts of the covert recordings involving Lanciana and Witness O, he would, at the very least, have conducted the defence case somewhat differently. Had he read the Summary of Evidence once it was eventually provided he may well have asked for a discharge of the jury, based upon non-disclosure. That application might conceivably have succeeded.

151 It is possible, though we need not decide this point, that some of the material in the Summary of Evidence might have been placed before the jury through careful cross-examination of the informant or other police witnesses.[22] The defence was denied the opportunity to seek to adduce that material in a legitimate way because the prosecution failed to make timely disclosure.

152 It was submitted on behalf of the respondent that disclosure, even if belated, had in the end been effected. It was further submitted that the real problem was that no one on the defence team had bothered to read the Summary of Evidence emailed to defence counsel, still less call for the transcripts of the conversations between Lanciana and Witness O.

153 In our view, there is force in that submission, but it does not absolve the prosecution from its failure to make the requisite disclosure. In the particular circumstances of this case, we consider that ground 1A(a) is made out. That ground is sufficient, on its own, to require that a new trial be had.

154 The balance of grounds 1A(ba) and 1A(c) are of less cogency. The material in the possession of the prosecution regarding the fact that purchasers of the subdivided lots had come into possession prior to 9 August 1995 confirmed an aspect of the defence case regarding the operation of Special Condition 10. Nonetheless, that fact was never really in issue. Accordingly, ground 1A(ba) standing alone cannot be sustained.

[22] The appellant made just this point in his revised written case.

155 There is greater strength in ground 1A(c). The fact that Michael Georgiou swore a series of statutory declarations to the effect that the purchase price of the land, which had by that stage been subdivided, had been $555,000, and that this was adequate consideration for the property transferred, was hardly surprising. He had, after all, acknowledged his own involvement in what was said to be a fraud upon the revenue. He could hardly say anything other than what he did in these statutory declarations.

156 Nonetheless, a willingness on the part of a key prosecution witness to have made what is in effect a perjured statement as to a material matter must be regarded as a valuable weapon in the hands of any competent cross-examiner. Had the statutory declarations been made available to the defence, at a timely stage of the proceedings, that weapon could have been wielded, perhaps with some effect. This ground, however, viewed in isolation, would not be sufficient to vitiate this trial. It is to be taken into account as part of ground 7.

157 Finally, it should be noted that the failure of defence counsel, and the rest of the defence team, to at least peruse the Summary of Evidence that was emailed through to them on the night of 30 May 2017, represents a central plank in the allegation that the manner in which the trial was conducted was so incompetent as to give rise to a miscarriage of justice.

Ground 2 — Improper cross-examination of Lanciana, Mrs Anile and the appellant

158 There are rules which govern the conduct of cross-examination in this and every other State. Cross-examination can and, within proper limits, should be searching, and in appropriate cases, vigorous. It should not, however, be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive.[23] Questions which are intended only to annoy or insult should not be put.

159 While it is not improper, in cross-examination as to credit, to put questions

[23] *Evidence Act 2008* s 41(3).

suggesting fraud, misconduct, or the commission of criminal offences, such questions should not be put unless (a) the matters suggested are part of the client's case, and (b) counsel has no reason to believe they are only put forward for the purpose of impugning the character of the witness.[24] Questions which affect the credibility of a witness by attacking their character, but are not otherwise relevant to the actual matters in issue, ought not be asked unless the cross-examiner has reasonable grounds for thinking that the imputation conveyed by those questions are well-founded or true.[25]

160 It is important in the interests of justice that cross-examination be conducted within reasonable limits. For example, previous convictions are ordinarily only likely to bear upon credibility where they are capable of showing a propensity to be untruthful.[26] Thus convictions for traffic offences would not normally be put to a witness by way of an attack upon credibility.[27]

161 Of course, there are additional constraints upon the way in which a prosecutor should go about the task of conducting cross-examination. The role of prosecuting counsel differs from that of an advocate representing an accused person. Prosecutors have a positive duty to make any evidence which could be in the interest of an accused available to that accused or their counsel. Their duty is not to obtain a conviction by any or all means. They must not adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack upon an accused person. That does not mean in properly carrying out their role, cross-examination and jury address must be bland or colourless, but they are not to be zealots and must ensure that they present the case against the accused fairly and honestly.[28]

[24]See generally Richard C Teece, *The Law and Conduct of the Legal Profession in New South Wales* (The Law Book Company Limited, 2nd ed, 1971) 69 citing the General Council of the Bar of England ruling regarding cross-examination (6 November 1950).

[25] Sir Gregory Gowans, *The Victorian Bar Professional Conduct, Practice and Etiquette* (The Law Book Company Limited, 1979) 74. See also Australian Bar Association, Barrister's Conduct Rules, r 66 as at 11 May 2013.

[26] *R v Hanson* [2005] 2 Cr App R 21.

[27] Compare *Bugg v Day* (1949) 79 CLR 442.

[28] *R v Smith* (2007) 179 A Crim R 453. See also *R v Bathgate* (1946) 46 SR (NSW) 281, 284–5; *Whitehorn v The Queen* (1983) 152 CLR 657; *King v The Queen* (1986) 161 CLR 423; and *R v*

162 Having regard to these principles, we are at a loss to understand some of the cross-examination that was directed by the prosecutor towards Lanciana. The very first questions asked of him, in cross-examination, concerned the death of his wife in 1984. The transcript reads as follows:

> Q: Mr Lanciana your first wife,
>
> A: Mariana ---?---Oh---
>
> Q: ---she was shot in the head wasn't she?---Yes as you well know.
>
> Q: Did you shoot her?---The answer has always been and always would be, no.
>
> A: Yes, did the police get someone for that murder did they?--- No.

163 These questions gave rise to ground 2(a)(i). The prosecutor could hardly have expected an affirmative answer to the question whether Lanciana murdered his wife. It seems to us to be perfectly obvious that this was not the point of the question. It was rather intended to plant the seed, in the mind of the jury, that Lanciana was a person of complete depravity. Apart from a brief mention in the covert recordings between the appellant and Witness U, of Lanciana having in the past been suspected of killing his wife, though never charged with that offence, it is difficult to see any proper foundation for this line of questioning.[29]

164 We note in that regard that in *Alister v The Queen,*[30] criticism was levelled at the prosecutor for having cross-examined an accused who gave evidence for the defence based upon imputations of suspicion and hearsay. Chief Justice Gibbs said that these questions should not have been put.[31] His Honour added that the greatest care should be exercised in controlling questioning of this kind lest the accused be

Bazley (1986) 21 A Crim R 19, 29.

29 Although the jury would have been aware, in any event, that the appellant and Witness U had referred, in the course of their discussions, to the rumours surrounding Lanciana and the death of his first wife, the prosecutor's focus upon this matter, at the commencement of his cross-examination, would have given it a great deal of prominence which it certainly did not deserve, in the context of this trial. Defence counsel could, in any event, have sought to have those parts of the discussions between the appellant and Witness U concerning this particular rumour excised, had he wished to do so.

30 (1984) 154 CLR 404 ('*Alister*').

31 Ibid 419

prejudiced by evidence of association or simply by innuendo. Justice Brennan was even more critical of the prosecutor's questions, holding that they were asked improperly merely to create prejudice against the accused. [32]

165 Returning to the present case, in the same way, the prosecutor followed up the questions concerning Lanciana's having murdered his wife with a series of questions that plainly implied that he had arranged for the murder of a man named Jim Belias. The passage in question reads as follows:

Q: Do you have the nickname, Percy No Mercy?---

A: Yes, that's when I was – it was a name I had when I was fighting.

Q: Yes, well you've been a fighter all your life, haven't you?

A: Yes, well not all my life. But you know---

Q: Most of your life? ---

A: -- a significant portion of it, yes.

Q: Ever heard of a man by the name of Jim Belias?

A: Yes.

Q: What's he doing these days?

A: He's dead.

Q: At the time he died, did he owe you some money?

A: Yeah, he did.

Q: How much?

A: M'mm, a hundred and something thousand.

Q: That's a lot of money?

A: And?

Q: Do you know how he died?

A: Yes. He was um, he was murdered. Was shot, I believe.

Q: In St Kilda?

A: I can't remember where.

[32] Ibid 462.

166 By this stage, the implication in the prosecutor's questions was perfectly clear. It was being suggested that Lanciana was, in effect, a person who would kill anyone who displeased him in some way, a dangerous and violent criminal.[33]

167 Before this second set of questions implying murder on the part of Lanciana had been put, he was cross-examined about other matters. He was asked about his prior convictions, of which there were a number. These included drug matters, thefts and even breaches of the *Corporations Act 2001*. He was questioned about prior civil proceedings in the Supreme Court, in which a finding had been made against him to the effect that he had engaged in forging documents,[34] as well as other dishonest conduct. He had also been found to have engaged in misleading conduct in order to avoid tax. It is fair to say that even by that stage of the cross examination, Lanciana would have been viewed by the jury as a witness of little credibility.

168 Once again, we are at a loss to see how this second set of questions regarding the murder of a debtor could be justified. The matter had been discussed essentially as rumour, in the covert conversations between the appellant and Witness U. Consistently with what was said by the High Court in *Alister*, that was not a sufficient basis upon which to cross-examine Lanciana on that subject.

169 It is of course possible that the prosecutor had in his possession some material, of which we are unaware (perhaps police intelligence), that suggested that Lanciana had been involved in the murder of Mr Belias. However, to raise the matter in the way that the prosecutor did, suggested what we would describe as a preparedness to wound, but not to strike.

170 The effect of all this upon the appellant's defence was no doubt highly detrimental. Not only was Lanciana being further discredited by rumour and innuendo. The fact that he and the appellant had had a longstanding and close friendship in the 1990s,

[33] This was the subject of passing reference by way of rumour between the appellant and Witness U in the course of their discussions. That did not justify the prosecutor launching into cross-examination of Lanciana on this subject, without any further basis for doing so.

[34] The forgeries were of Witness U's signature on various documents including on applications for credit.

which had already been established in evidence, would itself have been damaging to the defence. Lanciana was, in effect, being characterised as some kind of organised crime boss.[35]

171 Another series of questions put to Lanciana in cross-examination concerned his involvement in the Armaguard robbery. These were the very last questions asked of him before his evidence was terminated. These questions form the basis of ground 2(a)(iii).

172 The transcript reads as follows:

> Q: Mr Lanciana do you know anything about an armed robbery that was committed on 22 June 1994 when an Armaguard van was held up and $2.3m was stolen?
>
> A: As I indicated before the break, I'm not prepared to answer any more of your questions. What you said about my wife was shameful.
>
> HIS HONOUR: And now — so Mr Lanciana I direct you to answer the question put by the barrister. Do you want the question put again or do you want to respond to me?
>
> A: I apologise Your Honour, but no. I don't need the question put again, I won't be answering it.
>
> HIS HONOUR: All right. And so I've given you a direction to answer the question put by the learned prosecutor, you've understood that direction?
>
> A: Yes I have your Honour.
>
> HIS HONOUR: And you've understood that you're giving evidence on oath in this criminal trial?
>
> A: I do your Honour, yes.
>
> HIS HONOUR: All right. And that is your position?
>
> A: Yes it is.
>
> HIS HONOUR: Irrespective of how many times I might direct you to answer the question?
>
> A: That is correct your Honour.

[35] The jury would have noted the appellant's reference, in Mrs Anile's evidence, to having been made an offer by Lanciana that he could not refuse.

173 The prosecutor had to tread somewhat warily. As previously indicated, the prosecution case, as eventually opened, eschewed any direct link between the money laundering, and the Armaguard robbery.[36]

174 There had been a ruling at the commencement of the trial which had the effect of separating the Crown's allegation of money laundering from any link to that particular robbery. There had been a further ruling in relation to the cross-examination of the appellant precluding the prosecutor from suggesting to him that the charges brought against Lanciana were in any way connected to the laundering charge that the appellant faced. One might have thought, in these circumstances, that the prosecutor would be circumspect about raising the robbery, and Lanciana's involvement in it, in the way that he did. Instead, the cross-examination highlighted these matters in a way that was calculated to leave an indelible imprint upon the minds of the jury.

175 The criticisms of the prosecutor's cross-examination do not end there. Ground 2(b) complains of the cross-examination of the appellant's wife, Adele, who gave evidence for the defence. She described how she had located an important document, so far as the defence was concerned, namely, the copy of the receipt signed by Loukis Georgiou for $200,000. That receipt was said to be entirely consistent with the appellant's defence to the money laundering charge.

176 Mrs Anile had been assisted in various ways by a friend of the appellant, Jeanette Sharpe. She had apparently been a regular attendee at the trial. Ms Sharpe did not give evidence.

177 For reasons that are not apparent, Mrs Anile was asked questions which clearly implied that the appellant had been in a sexual relationship with Ms Sharpe.

178 The transcript of the cross-examination reads as follows:

[36] The prosecutor explained the shift in the Crown case in the following way:

'It's not part of the Crown case that the money came from the Richmond Armaguard robbery, nor is it in fact fair to say that it was some part of some operation and that in that operation Mr Anile was a singular part of an organised crime syndicate.'.

Q: What was or what is the relationship between her and your husband?

A: They're very, very good friends.

Q: Anything more than that?

A: No

Q: Are you sure about that?

A: Yes absolutely.

179 No foundation of any kind appears to have been laid for any such questions. It is by no means apparent what the basis for this line of cross-examination may have been. It certainly did not bear upon the credibility of Mrs Anile. To the extent that it suggested that the appellant may have been unfaithful to his wife, it reflected adversely upon the appellant's character at a time when his character had not yet been put in issue.[37]

180 Next we turn to an aspect of the cross-examination of the appellant. Here, the prosecutor focused upon a series of questions concerning the receipt purportedly signed by Loukis Georgiou that were said to be inappropriate. These questions, which are set out at [39] of these reasons for judgment, raised the issue of whether the signature on that receipt had been forged, implying that this had been done at the behest, at the very least, of the appellant.

181 Once again, it is difficult to see any foundation for the suggestion, by innuendo, that the appellant had forged, or caused to be forged, the signature. Loukis Georgiou himself had testified that the signature was his. If the prosecution wished to take issue with that evidence, an application could have been made under s 38 of the *Evidence Act 2008* to challenge Loukis. Alternatively, a handwriting expert could have been asked to examine the signature, and proffer a view as to whether it was genuine or forged.[38] None of that having been done, the issue should not have been simply thrown up in the air, and left for the jury to speculate about.

[37] Even if the appellant's character had been put in issue by this stage, it is highly doubtful that there was any proper foundation for the cross-examination of Mrs Anile along these lines.

[38] We are cognisant of the fact that the particular document was a somewhat poor photocopy, and a handwriting expert might have had great difficulty in commenting upon the authenticity of Loukis Georgiou's signature.

182 In short, the cross-examination of Lanciana, Adele Anile, and of the appellant, was improper in a number of significant respects. If ground 2 stood alone, it might not have been sufficient to vitiate these convictions. However, the ground should not be viewed in isolation. It plainly forms part of the appellant's contention in ground 7 that there was an aggregation of errors that, viewed cumulatively, meant that this trial had miscarried.

Ground 4

183 Although this ground raises a number of criticisms concerning the cross-examination of the appellant, there is really only one point upon which any reliance was placed. It was said that cross-examination of the appellant regarding his knowledge of Lanciana's previous drug conviction had been misleading, and deceptive.

184 The complaint concerned the way in which the prosecutor dealt with the estimated street value of the cannabis grown by Lanciana in 1993. It turned largely upon the fact that he misled the jury by overstating that value by a factor of almost 10. The judgment of the Court of Appeal,[39] which the prosecutor had in his possession when he questioned the appellant about Lanciana's criminal past made it clear that the total weight of the plants had been 79.74 kilograms, with an estimated street value of approximately $346,000. The vastly larger figure of $2.295 million, which the prosecutor put to the appellant, was based on what the plants might have been worth if they had grown to maturity. It was therefore quite misleading, so it was said, for the prosecutor have used that figure when he knew full well, or at least ought to have known, that that was not the basis upon which Lanciana had been sentenced.

185 In addition, it was submitted that the entire attack upon the appellant regarding this matter had been improper. It drew no distinction between his being a solicitor acting on instructions, and a witness helping a friend. The cross-examination of the appellant had been highly misleading.

[39] *R v Lanciana* (1996) 84 A Crim R 268.

186 Whatever may be said about ground 4, it is clear that this ground cannot be made out. It could not, in the circumstances of this case, have on its own, brought about a miscarriage of justice.[40] Nonetheless, it is a matter to be taken into account when considering ground 7.

187 In addition, it should be noted that defence counsel took no objection to this cross-examination, or indeed, any of the questions asked of Lanciana, Mrs Anile, or the appellant save for those concerning Lanciana's activities in 1993.

188 Defence counsel was under a clear duty to object in the strongest possible terms to a number of the questions put by the prosecutor in cross-examination. He may have thought that to do so would highlight matters that were already adverse to the appellant, but he had any number of opportunities to do so in the absence of the jury. He could also have sought a discharge of the jury, but did not do so. His failure to take any such objections provides some support for the proposition that the manner in which the defence was conducted was incompetent, to which we shall return when we deal with ground 9.

189 That is not to say that the trial judge should not himself have intervened when the prosecutor transgressed. There comes a point at which cross-examination ceases to be acceptable, and should be stopped. This was a case where that power ought to have been exercised.

Grounds 5 and 6 — The conviction for obtaining a financial advantage by deception

190 These grounds challenge the conviction on charge 2. Ground 5 is put on the basis that the jury could not reasonably have been satisfied that the elements of that offence, at a factual level, had been made out. Ground 6 is put on the basis that the appellant did not, himself, obtain financial advantage through the avoidance of

[40] Cf the manner in which the prosecutor conducted the trial in *Libke v The Queen* (2007) 230 CLR 559. Even there, the High Court held that the improper conduct of the prosecutor in the course of cross-examining the accused had not resulted in a miscarriage of justice. Cf *Bugeja v R* (2010) 30 VR 493.

stamp duty. More particularly, ground 6 contends that any advantage that might have been obtained through the evasion of stamp duty accrued either to Anile Residential Pty Ltd (in which the appellant at one stage had a half share) or to those who ultimately purchased individual lots of land from that company.

191 Charge 2 alleged, in terms, that the appellant 'obtained for himself a financial advantage by the reduction on the amount of stamp duty owed in sum of $14,088'. The figure was calculated on the basis that the stamp duty payable on $955,000 was $30,759. However the stamp duty payable on $555,000 was only $15,871. It was the difference between those two amounts than came to $14,088. The defence case was the correct amount of stamp duty had been paid given that the true purchase price was $555,000.

192 Of course, the contract that was tendered specified a purchase price of $555,000. It was submitted, however, that it had not been disputed at trial that the appellant was never himself the purchaser of the land, but rather, through a nomination clause the company in which he had a 50 per cent shareholding. It was submitted, therefore, that even if the appellant had engaged in some form of deception, intending to evade stamp duty, he himself had not obtained a financial advantage by doing so.

193 Section 82(1) of the *Crimes Act 1958* provides as follows:

> A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

194 Part 1 of the *Crimes Act 1958* contains no definition of the term 'financial advantage'. Section 82 was modelled on the offence of obtaining a pecuniary advantage by deception in s 16 of the *Theft Act 1968 (UK)*. Section 16(2) of that Act contained a detailed definition of the phrase 'pecuniary advantage', but one which, singularly, was not incorporated into the Victorian provisions.

195 The section is normally invoked in cases where the accused has obtained credit by deception. It also usually applies where the accused has obtained relief from a pre-

existing debt, or possibly incurred or evaded an unenforceable debt.

196 What is clear is that there is no need, under the section, for the financial advantage to be obtained by the accused for his or her own personal benefit. Section 82 makes it plain that obtaining a benefit for another is also covered.[41]

197 As indicated, the indictment in the present case alleged that the appellant had dishonestly obtained *for himself* a financial advantage, namely a reduction to the amount of stamp duty owed to the State Revenue Office in the sum of $14,888. The charge ought properly to have been particularised by alleging that he had dishonestly obtained for another, whatever the relevant amount happened to be. That other might have been Anile Residential Pty Ltd if it had been obliged to pay the stamp duty. Alternatively, it might have been the actual individual purchasers of the lots.

198 An error in particularising the charge in this way, assuming that is what occurred, would not, inevitably, lead to the quashing of a conviction. There was never any doubt as to how the prosecution put its case regarding this charge. Had the particulars included the words 'for another', as one basis upon which the charge could be made out, ground 6 would have no merit at all. Even if the point now raised under that ground were to be made good, it would not of itself warrant a quashing of the conviction. It would certainly not require the entry of a judgment and verdict of acquittal.

199 As regards ground 5, we consider that it cannot properly be said that the evidence in support of charge 2 (separately from the failure to particularise that charge appropriately), rendered the conviction unreasonable. The defence case was that the arrangement between the appellant and the vendors had been in two parts. The first concerned the purchase of the land. The second concerned allowing the purchaser to deal with the property, by sub-dividing it after the payment of the deposit and before settlement. According to the appellant, that was what the extra $200,000, paid

41 *Richardson v Skells* [1976] Crim LR 448.

in cash had been for. That figure had been arrived at after negotiations with the vendors.

200 Once the jury found, as they were well entitled to do, that the appellant had, over a period, paid some $400,000 in cash to the Georgiou brothers, rather than $200,000, the defence case in answer to charge 2 was effectively destroyed. The explanation proffered for the payment of $200,000 could not accommodate the payment of $400,000. That meant that whatever view the jury took of the receipt signed by Loukis Georgiou, it could not support the defence as placed before the jury. It cannot be said that the jury acting reasonably must have acquitted the appellant on charge 2.[42] We would therefore reject ground 5.

Ground 8 — Unreliable witness warning

201 It is convenient next to turn to ground 8, which, in our view, was made out. This ground arose because the trial judge, in the course of discussions with counsel as to what directions were sought by each side, was confronted with a submission as to how to deal with Lanciana, and his having refused to answer any further questions in cross-examination.

202 After Lanciana left the courtroom, there was discussion as to what, if anything, the judge should say to the jury about his evidence. The prosecutor at one point submitted that the judge should simply direct them to disregard Lanciana's evidence entirely. Moments later, however, he resiled from that submission and foreshadowed that he might put forward a different approach that could be taken in relation to that matter.

203 The following day, the trial judge referred to s 31 of the *Jury Directions Act 2015*, which deals with unreliable evidence. His Honour noted that the defence sought such a direction in relation to Michael and Loukis Georgiou. He then asked whether the Crown was making a similar submission in relation to Lanciana.

[42] *Libke v The Queen* (2007) 230 CLR 559, 596–7 (Hayne J).

204 The prosecutor at once indicated that he did not seek any such direction. However, he proffered an alternative. He submitted that his Honour should make a comment to the jury about the weight to be given to Lanciana's evidence. That comment would be to the effect that the prosecution had been deprived of further cross-examination because of his refusal to answer any more questions. For that reason, the jury should be told to be 'very cautious' when considering his evidence. Indeed, the prosecutor submitted they should be told, in terms, to give it very little, if any, weight.

205 The prosecutor seems to have had in mind an alternative in the event that the trial judge rejected his 'comment' proposal. That alternative was the unreliability direction that the trial judge had previously flagged. This would be given on the basis of Lanciana being a criminally concerned witness. His Honour appeared to be attracted to that alternative, referring to the significant matters that might affect his reliability as a person who was 'criminally concerned'. It is instructive to note that his Honour referred in that context to witnesses 'shifting blame' and 'minimising their own involvement'.

206 The prosecutor replied by saying that he wanted 'a little bit more' than the unreliability direction then being mooted. Indeed, he went on to say that had Lanciana completed his evidence, the judge would still have given that particular unreliability direction. He repeated that he was seeking more than that — a strong comment, or further direction.

207 The trial judge replied that he would not be making a comment of the kind sought. He said, 'I'm going to give a direction in the standard form, and I'm going to emphasise the factors that I have just emphasised'. In other words, he made it clear that he would be giving an unreliability direction, of the standard kind, on its own. The prosecutor was content with that.

208 Defence counsel, when asked whether he wanted to say anything about the giving of such a direction, responded that he did not think he could usefully argue against it.

He added that he was content with such a direction being given.

209 During the course of the prosecutor's closing address, he reminded the jury that he had not been able to complete his cross-examination of Lanciana. He told them that he would have wanted to put to him a number of additional matters that would have gone to his credit. He described Lanciana as someone directly concerned with the money laundering charge, labelling him 'criminally concerned in this offending'. He went on to say:

> And what that means is that his Honour will give you a direction about Mr Lanciana's evidence and his Honour will ask you to or warn you that his evidence may be unreliable for a number of reasons.

210 The prosecutor then identified some of these reasons. First, Lanciana was 'criminally concerned'. Next, the prosecutor had been denied the opportunity to cross-examine him fully. This meant, according to the prosecutor, that the trial judge would warn the jury of the need to exercise caution in determining whether to accept Lanciana's evidence at all.

211 In the course of his charge to the jury, the judge did precisely what he had previously intimated he would do. He gave a standard unreliability direction, specifically geared to Lanciana. Indeed, in the course of giving that direction, he told the jury that they should look for any supporting evidence led in the trial that they accepted. He defined supporting evidence as evidence which came from a source independent of Lanciana. In that regard, he referred to the evidence of the appellant, and the signed receipt for $200,000. To adapt the language traditionally used at common law, he invited the jury to look for corroboration of Lanciana's testimony notwithstanding that, as given, it was exculpatory of the appellant.

212 The application to add ground 8 as a ground of appeal was made during the course of oral argument. The fact that the unreliability direction may have undermined the defence case, to some degree, by discrediting the only witness who had been called to give direct evidence as to the source of the funds, was perhaps not anticipated. Plainly, the trial judge believed that by giving this direction, he was acting in some

way more favourably to the appellant than would have been the case had he acceded to what the prosecutor had asked him to do.

213 Of course, Lanciana was significantly discredited in any event. However, that is not to the point if the direction itself that was given should not have formed any part of the trial judge's charge.

214 The other particulars of ground 8, as now drafted, also need to be taken into account. The written submissions in support of that ground make the point clearly:

> The direction as to unreliability in being criminally concerned was immediately followed by a bad character direction, directions as to lack of cross-examination, then a return to the unreliability direction, then a direction on supporting evidence, and then directions as to the incomplete evidence. This was followed by a direction on the applicant's lies.
>
> Percy Lanciana provided the central theme in the prosecutor's address (Lanciana was 'a dishonest crook') … following his cross-examination 'your very close friend'… leaving the overwhelming flavour of guilt by associations. This compounding effect prevented a fair trial.

215 The rationale for what used to be called, at common law, the 'accomplice warning' is perfectly clear. The warning had to be given in order to protect the accused from false evidence being given by a witness capable of being viewed as an accomplice. Such a witness was likely to be motivated by a desire falsely to minimise his or her own role in the offending, and to maximise the role played by the accused. That said, we have never previously come across a case where an accomplice warning was given in respect of a defence witness who gave wholly exculpatory evidence.

216 In our view, the trial judge, though acting with the best of intentions, fell into error when he determined to give an unreliable witness direction in respect of Lanciana. Whatever the jury may have made of that witness' evidence (and it was hardly likely to have given it any great credence), the appellant should not have had to overcome the additional hurdle of having the jury told to look for supporting evidence before acting upon anything that Lanciana said.

Balance of ground 9 — Incompetent manner in which trial was conducted

217 We have already expressed disapproval of the fact that defence counsel took no objection whatsoever to any of the improper questions asked by the prosecutor in cross-examination of key defence witnesses. We have also noted that rather than objecting, as he ought to have done, to a 'criminally concerned' witness direction, defence counsel specifically said that he was content for that direction to be given. That, too, was an error.

218 Perhaps the worst aspect of the conduct of the trial from a defence perspective was defence counsel's failure to at least peruse the Summary of Evidence, that was emailed to him on the night of 30 May 2017. Of course, that document should have been provided well before the trial. However, it was still received in sufficient time to reconsider the decision to call Lanciana. It should have been obvious to defence counsel that, having regard to Lanciana's centrality in the events surrounding these charges, it was essential that he give the most careful consideration to whether or not to risk calling him as a witness for the defence.

219 Of course hindsight is a wonderful thing. Nonetheless we cannot avoid thinking that had defence counsel read the Summary of Evidence, and given it proper attention, Lanciana would never have been called. It would have been blindingly obvious from that document that, under cross-examination, Lanciana could do immense harm to the defence case, as in fact, though for different reasons, he did.

220 We have some sympathy for the position in which defence counsel found himself. This was a difficult trial, and we suspect that the appellant may have been a difficult client. There was also the fact that the appellant had suffered a serious heart condition shortly before he began to give evidence. Defence counsel had to deal with a number of complex issues, as well as a large body of documentation. We are also cognisant of what the prosecutor said to the judge when he suggested that his Honour need only read pages 54 -56 of the Summary of Evidence in order to get the flavour of what the document contained. Regrettably, that statement was made in a particular context, but had the potential to be misunderstood, as it seems to have been.

221 Nonetheless, it is not imposing too heavy a burden upon counsel to expect them to read documents sent to them by the prosecution which, on their face, look as though they may have a significant bearing upon the conduct of the trial.

222 We accept that incompetence in the manner in which a trial was conducted is not, of itself, a sufficient basis for concluding that a miscarriage of justice had occurred.

223 In *R v Birks*[43] Gleeson CJ set out the relevant principles as follows:

> 1. A Court of Criminal Appeal has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that has to be considered in the light of the way in which the system of criminal justice operates.
>
> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence.
>
> 3. However, there may arise cases where something has occurred in the running of a trial, perhaps as the result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible, and undesirable, to attempt to define such cases with precision. When they arise they will attract appellate intervention.[44]

224 In *Nudd v The Queen* [45] Gummow and Hayne JJ said:

> [A]n appeal against conviction must ultimately focus upon the trial and conviction of the accused person not the professional standards of the accused's counsel. Was what happened, or did not happen, at trial a miscarriage of justice?[46]

225 Of course, for a trial to be fair it is not necessary that every tactical decision of counsel turns out to have been carefully considered or wise. It is not the role of this Court to investigate such decisions in order to determine whether they were made with the fullest possible examination of all relevant considerations. Often decisions are made in the course of a trial that turn out to be ill advised in retrospect. That

43 (1990) 19 NSWLR 677.

44 Ibid 685.

45 (2006) 225 ALR 161.

46 Ibid [25].

does not make them wrong or imprudent at the time that they were made. Nor does it make the client necessarily a victim of unfairness.[47]

226 In this case defence counsel failed, in several important respects, to conduct the trial as he ought to have done. It is unnecessary for us to determine whether these failings, had they stood alone, would have been sufficient to vitiate these convictions. It is sufficient simply to say that when combined with the prosecution's failure to disclose, the improper questions asked of defence witnesses, the failure to take exception to that part of the charge that constituted an accomplice warning in relation to Lanciana, and the deficiency in the particularisation of charge 2, too much went wrong in this trial to allow the convictions to stand.

Ground 7 — Aggregate of defects

227 At the very least, therefore, this is one of those rare cases where ground 7,

[47] *TKWJ v The Queen* (2002) 212 CLR 124.

228 alleging that an aggregate of defects gave rise to a miscarriage of justice should succeed.[48]

Conclusion

229 For these reasons we concluded at the end of the oral hearing in this matter, that the appellant's convictions could not be permitted to stand, and made orders accordingly.

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[48] See *R v Kotzmann* [1999] 2 VR 123 as to aggregation of defects amounting to miscarriage of justice.